Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CHARLES HINES,

Petitioner,

v.

ABB VETCO GRAY, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 29, 1996

45 pp

QUESTIONS PRESENTED

1. Whether an ADEA plaintiff, who signed a release which clearly fails to comply with the Older Workers Benefit Protection Act (29 U.S.C. § 626(f)), must repay any release consideration as a condition to asserting claims under the ADEA.

2. Assuming an ADEA plaintiff must repay release consideration under the circumstances set out in question 1, should the plaintiff be given a reasonable amount of time to repay the release consideration in light of the principles set out in RESTATEMENT (SECOND) OF CONTRACTS § 381 (1978), especially considering whether the employer's conduct impaired the plaintiff's ability to repay the consideration?

PARTIES TO THE PROCEEDING

Petitioner Chuck Hines was the plaintiff in the United States District Court, and was the appellant in the United States Court of Appeals for the Fifth Circuit.

Respondent ABB Vetco, Inc. was the defendant in the United States District Court, and was the appellee in the United States Court of Appeals for the Fifth Circuit.

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NOTES ON APPENDIX

Attached to this petition are the following documents:

Appendix A: Opinion (unpublished) of the Court of Appeals for the Fifth Circuit, dated April 29, 1996, affirming summary judgment in favor of ABB Vetco Gray (employer).

Appendix B: Order [Opinion] of the district court, dated September 14, 1995, granting summary judgment in favor of ABB Vetco Gray.

Appendix C: Final Judgment of the district court, dated September 14, 1995, entering final judgment in favor of ABB Vetco Gray.

Appendix D: Affidavit of Charles Hines, dated September 2, 1995, which was attached to Hines' opposition to ABB Vetco Gray's motion for summary judgment.

No. _____

IN THE
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OCTOBER TERM 1996

CHARLES HINES,

Petitioner,

V.

ABB VETCO GRAY, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles Hines ("Hines"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 29, 1996.

I. Opinions Below

1. The district court granted summary judgment in favor of ABB Vetco Gray, Inc. (ABB Vetco Gray") on September 14, 1996. The opinion of the district court is reproduced in the appendix at page B-1.

The final judgment of the district court is reproduced in the appendix at page C-1. The district court's opinion was not published.

2. The Court of Appeals for the Fifth Circuit affirmed the district court on April 29, 1996. The opinion of the Fifth Circuit is reproduced in the appendix at page A-1. The Fifth Circuit's opinion was not published. The affirmance, without an opinion, is reflected at 85 F.3d 624.

II. Jurisdiction

3. The judgment of the Fifth Circuit was entered on April 29, 1996 (Appendix A-1). The 90th day after the judgment was Sunday, July 28, 1996, and this petition was filed the next business day, Monday, July 29, 1996.

4. No motion for rehearing was filed with the Fifth Circuit. There has not been any request for any extension concerning the deadline for filing this petition for a writ of certiorari.

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. Statutory Provisions Involved

6. This petition centers around Section 201 of the Older Workers Benefit Protection Act ("OWBPA"), Pub L. No. 101-433, 104 Stat. 978, 983-4 (October 16, 1990), which was codified at 29 U.S.C. § 626(f), Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq*. Section 626(f) reads as follows:

> (f)(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a

waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual

in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to

file a charge or participate in an investigation or proceeding conducted by the Commission.

IV. Statement of Case

A. Introduction and Factual Background

7. Hines was employed at ABB Vetco for 5 years until he was fired on September 30, 1993.[1/] He had been a foreman at the time of his termination, with 50-60 people working under him.

8. Hines came to work on September 30, 1993 just like any other day in his 5-year history at ABB Vetco. He had received no warning of any problem or complaint, he had recently had an "excellent" evaluation with a 5% raise, and the productivity and efficiency statistics by which his department was judged were "up" (some at 5-year highs) (Appendix D-2, ¶ 3).

9. Bob McNamara, who had recently given Hines an "excellent" review, came into Hines' office and, without any warning whatsoever, told Hines he was being laid off. McNamara then took Hines into Sharon Clarkson's office (human resources department) (Appendix D-2—D-3, ¶¶ 5-6).

10. Clarkson stated that "we" can offer Hines a severance package, "today" and "right now," and that if Hines did not agree to it "right now," it would be withdrawn (Appendix D-2, ¶¶ 5-6). Hines then had 2 options: (1) he could the take "severance offer," with 8 weeks of severance pay, or (2) he could reject the severance offer and would

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[1/] Hines was replaced by a man under 40 years of age (Appendix D-6). Hines was 58 at the date of his termination, and ABB Vetco Gray did not dispute Hines' ability to establish a prima facie case (Appendix B-6).

immediately be "out on the street," with no severance pay of any sort (Appendix D-3, ¶ 6).

11. Clarkson had documents already prepared for Hines' signature when Hines was escorted into her office, including a release (Appendix D-2, ¶ 5, D-8). Clarkson showed Hines page 1 of the "release" letter, which stated the severance package the company was offering him "right now" only. Clarkson then turned to page 2 of the letter, which contained the release language and a signature block for Hines, and stated that "we" need your signature "here" (pointing to the signature block) for you to get your check. Neither Clarkson nor McNamara said anything about asking Hines to release any employment discrimination claims (Appendix D-3, ¶ 7).

12. Hines then signed the release letter, which he understood to be taking care of severance and vacation pay—but he did not understand it as a release of employment discrimination claims (Appendix D-3, ¶ 7).

13. At the time he was fired, Hines had not received any indication of dissatisfaction from his employer, and had made no effort to seek other employment. Indeed, being fired was potentially catastrophic to Hines because his wife had breast cancer surgery, had subsequent surgery because of complications, and was under continuing care in connection with the breast cancer—the prospect of losing their health insurance was horrifying to Hines. His wife worked part time, and her income was not nearly sufficient to allow them to make their minimum monthly payments (including a home mortgage and car payment) (Appendix D-6, ¶ 14).

14. Hines was not advised by ABB Vetco in connection with the release to consult with an attorney (in violation of 29 U.S.C. § 626(f)(1)(E)), was not given 21 days to consider the proposed release

agreement (in violation of 29 U.S.C. § 626(f)(1)(F)(i)), and was not advised that he could revoke the agreement 7 days after signing it (in violation of 29 U.S.C. § 626(f)(1)(G)) (Appendix D-4, ¶ 10).

15. The "release" contained language releasing all employment discrimination claims, including those under the ADEA (Appendix D-9).

B. District Court Pleadings and Summary Judgment

16. Hines sued ABB Vetco Gray for age discrimination under the ADEA; and ABB Vetco filed an answer and a counterclaim against Hines, alleging breach of contract and that Hines had released all claims in issue in this lawsuit (Appendix B-1). Hines' answer to the counterclaim alleged that the release violated the Older Workers Benefit Protection Act ("OWBPA") and was not "knowing and voluntary." ABB Vetco Gray admitted that the release (Appendix D-8—D-9) failed to comply with the OWBPA (Appendix B-4).

17. ABB Vetco Gray filed a motion for summary judgment contending that, although the release failed to comply with the OWBPA, Hines had ratified the release by not repaying the release consideration before filing suit (Appendix B-4). The district court granted ABB Vetco Gray's motion for summary judgment (Appendix B-1) and entered final judgment against Hines (Appendix C-1).

18. Hines' Original Answer to ABB Vetco Gray's counterclaim made an unconditional tender of the release consideration in the form of an offset against any recovery. Hines' answer also stipulated, in the event he lost his lawsuit, that a judgment would be entered against him in the amount of the release consideration (Appendix A-2—A-3). Hines did not literally repay the release consideration. However, he filed a motion to continue the summary judgment decision because he was in

the process of raising the necessary funds; but the district court denied the motion for continuance on the ground that it was then too late (almost 2 years after the signing of the release) to repay the release consideration (Appendix B-5).

C. Opinion of the Court of Appeals

19. The Fifth Circuit affirmed the district court's rendition of summary judgment, and held that a "failure to 'tender back' the consideration paid in exchange for the waiver of specific claims in a timely manner precludes a suit on those claims by the terminated employee" (Appendix A-2).

20. The Fifth Circuit addressed Hines' stipulation that ABB Vetco Gray would receive an offset in the amount of the severance consideration, and ruled that such a tender of the consideration would render the Fifth Circuit's "tender back" rule "meaningless" (Appendix A-2).

21. The Fifth Circuit did not set out the basis for deciding what was a "timely" repayment of the consideration, but stated that the repayment had to be made "shortly after" discovery of the alleged "deficiency" of the release (Appendix A-3).

22. Hines alleged that it had only been 4 months since he had learned that there was a "deficiency" concerning the release (Appendix D-5, ¶ 13), but the Fifth Circuit stated that Hines' efforts to continue the summary judgment proceeding to allow him to actually repay the money "came almost two years after he was terminated, six months after he filed suit, and four months after [ABB] Vetco [Gray] notified him of their intention to rely upon their waiver agreement as a defense" (Appendix A-3).

V. Reasons for Granting Writ

23. This case involves a simple reading of the plain language of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which states that an employee "may not waive" ADEA rights unless a release is in compliance with the OWBPA. 29 U.S.C. § 626(f)(1). The Fifth Circuit has held that, the plain language of the OWBPA notwithstanding, the employee may waive ADEA rights under a defective release if the employee does not repay the release consideration "timely" or "shortly after discovery of the alleged deficiency" (Appendix A-3).

24. The Fifth Circuit's "pay back" requirement is inconsistent with the plain language of the OWBPA and this Court's holding in *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 517 (1968), where a pay back of release consideration was not required under the Federal Employers Liability Act ("FELA"). The Fifth Circuit's "pay back" requirement is also squarely in conflict with the holdings of the Seventh and Eleventh Circuits. *See Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683-84 (7th Cir. 1993) (plaintiff not required to pay back the release consideration as a condition to filing suit where release was deficient under OWBPA), *cert. denied*, 114 S. Ct. 2104 (1994); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992) (same).

25. Even if the "pay back" requirement is consistent with the language of the OWBPA, the Fifth Circuit has applied it without regard to public law concepts of equity or common law contract principles which would allow a "reasonable" amount of time to repay the consideration, especially taking into account (for "reasonable" time) whether the employer's conduct has contributed to the employee's inability to promptly repay the release consideration.

26. The combined effect of the Fifth Circuit's position is that it literally rewards those employers who most egregiously violate the OWBPA, where the employee is fired without notice and without the opportunity to find new employment, so that the employee *must* use the release consideration to pay necessary living expenses. The Fifth Circuit's "pay back" rule fails to take into account the suddenness of the termination, the egregiousness of the OWBPA violation, and whether the employer's potentially unlawful conduct impaired the employee's financial ability to repay the consideration.

A. The Plain Language of the Older Workers Benefit Protection Act

27. The OWBPA limits a person's power to waive ADEA claims: "An individual *may not waive* any right or claim under this chapter unless the waiver is *knowing and voluntary*." 29 U.S.C. § 626(f)(1) (emphasis added).

28. The OWBPA then states that a release "may not be considered knowing and voluntary unless at a minimum":

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

> *(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;*
>
> *(F)(i) the individual is given a period of at least 21 days within which to consider the agreement;* or
>
> (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
>
> *(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired[.]*

29 U.S.C. § 626(f) (emphasis added). Subsections 626(f)(1)(E), 626(f)(1)(F)(i), and 626(f)(1)(G) are italicized because those are the sections that ABB Vetco Gray failed to satisfy in the release presented to Hines.

29. The OWBPA further states that, in "any dispute that may arise" as to whether the § 626(f)(1) requirements are met, the "party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver has been knowing and voluntary pursuant to" § 626(f)(1) or (2). *See* 29 U.S.C. § 626(f)(3).

30. The Fifth Circuit's holding clearly allows waiver under circumstances in which the OWBPA literally denies the employee the *power* to effect a waiver (Appendix A-2). Although the Fifth Circuit's opinion below did not explain its rationale, it has previously explained that it is not enforcing the release agreement that is deficient under the OWBPA. *See Wamsley v. Champlin Refining and Chemicals*, 11 F.3d

534, 540 n.11 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995).[2/] Instead, the Fifth Circuit's rule enforces a "new promise, evidenced by subsequent conduct, to be bound by the terms of the original waiver agreements." 11 F.3d at 540 n.11. Yet, the plain language of the OWBPA requires that any agreement, *old* or *new*, must satisfy the terms of the Act, so that the employee literally has no power to waive the ADEA claims. *See* 29 U.S.C. § 626(f)(1) (employee "may not waive" ADEA claims under release that is deficient); 29 U.S.C. § 626(f)(3) (party asserting "validity of waiver" has "burden of proving" that requirements of OWBPA were satisfied).

31. A pay back requirement was rejected by this Court in *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968), addressing an improperly obtained release of FELA claims. The plaintiff in *Hogue* was not required to pay back the consideration as a condition to filing suit, and the defendant was protected through the allowance of an offset (in the amount of the release consideration) against the plaintiff's recovery. 390 U.S. at 518; *see also Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 684 (7th Cir. 1993) (same holding with ADEA & OWBPA), *cert. denied*, 114 S. Ct. 2104 (1994).

2/ The Fifth's Circuit's "pay back" rule was developed in *Blakeney v. Lomas Information Systems, Inc.*, 65 F. 3d 482 (5th Cir.), *cert. denied*, 116 S. Ct. 1042 (1995); *Wittorf v. Shell Oil Co.*, 37 F. 3d 1151, 1154 (5th Cir. 1994); and *Wamsley v. Champlin Refining and Chemicals*, 11 F.3d 534, 540 n.11 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995).

B. The Conflict Between the Circuits on the "Pay Back" Requirement

32. The Fifth Circuit's pay back rule[3/] is in conflict with the Seventh and Eleventh Circuits: *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683-84 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 1992); *Oberg v. Allied Van Lines, Inc.*, 1992 U.S. Dist. LEXIS 11208, *19, 59 F.E.P. Cases 769 (N.D. Ill. 1992), *aff'd*, 11 F.3d 679, 683-84 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991).

33. The Seventh Circuit in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683-84 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), examined both the language and legislative history of OWBPA and rejected any requirement for the plaintiff who has signed a defective release to "tender back" the severance benefits. 11 F.3d at 683-84. The Seventh Circuit focused on § 626(f)(1) ("an individual may not waive"), and held that (a) the OWBPA "forbids any waiver," and (b) that an employee "as a matter of law" cannot "ratify" an agreement violative of § 626(f)(1). 11 F.3d at 684.

C. The Fifth Circuit's Rule Fails to Provide A "Reasonable" Amount of Time to Repay the Release Consideration

34. Even if the Fifth Circuit's "pay back" rule is consistent with the OWBPA, the Fifth Circuit's application of that rule inexplicably

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3/ The Fourth Circuit has agreed with the Fifth Circuit in adopting the "pay back" rule: *Blistein v. St. John's College*, 74 F.3d 1459, 1465-66 (4th Cir. 1996) (noting split in circuits); *O'Shea v. Commercial Credit Corporation*, 930 F.2d 358, 362 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991).

fails to take into account what may be a "reasonable" amount of time for the employee to repay the release consideration. The Fifth Circuit has based its "pay back" rule on common law contract principles, *Wamsley v. Champlin Refining and Chemicals*, 11 F.3d 534, 540 nn.10&11 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995), yet those contract principles would clearly allow a plaintiff a "reasonable" amount of time to repay the consideration, and the defendant's behavior or misbehavior would be taken into account on what constitutes a "reasonable" time.

35. The Restatement of Contracts addresses when a party seeking rescission must repay consideration for a contract, and expresses the requirement in terms of a "reasonable" amount of time. RESTATEMENT (SECOND) OF CONTRACTS § 381 (1978). The Restatement states that a number of factors should be considered in determining what constitutes a "reasonable" amount of time, including whether the delay may have resulted in justifiable reliance by the defendant, whether the ground for avoidance was the result of fault by either party, and whether the defendant's conduct contributed to the delay. *See* RESTATEMENT (SECOND) OF CONTRACTS § 381(3)(b)-(d) (1978).

VI. Conclusion

36. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40805
Summary Calendar

CHARLES HINES,

Plaintiff-Counter
Defendant-Appellant,

versus

ABB VETCO GRAY, INC.,

Defendant-Counter
Claimant-Appellee,

Appeal from the United States District Court
for the Southern District of Texas
(G-95-CV-215)

Before REAVLEY, SMITH and PARKER, Circuit Judges.

PER CURIAM.*

Hines sued ABB Vetco Gray, Inc. (Vetco) for age discrimination a year and a half after his termination.[1] Because Hines had signed a waiver agreement which explicitly waived any claims for age discrimination and because Hines had failed to "tender back" the consideration paid by Vetco for the waiver in a timely manner, the district court granted a summary judgment for Vetco.

Hines appeals.

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[1] See 29 U.S.C. § § 621 et. seq. (Age Discrimination in Employment Act of 1967); Tex. Lab. Code Ann. § 21.001 et. seq. (Texas Commission on Human Rights Act).

Waiver agreements failing to meet the requirements of the Older Workers Benefits Protection Act of 1990 are voidable at the election of the terminated individual.[2] We have held that failure to "tender back" the consideration paid in exchange for the waiver of specified claims in a timely manner precludes a suit on those claims by the terminated employee.[3] Hines requests that we overrule such precedent and follow contrary decisions from other circuits.[4] However, prior panel opinions are binding precedent on subsequent panels absent action by the court en banc, the Supreme Court, or the legislature.[5]

Next, Hines asserts that he unconditionally tendered the money to Vetco. His "unconditional tender" occurred in his Original Answer to Vetco's Counterclaim where he stipulated that any recovery on his suit should be offset by the severance agreement, or in the event that he did not recover any money, the district court should enter a judgment against him in the amount of the severance agreement. Hines argument is unpersuasive. Such a reading would render our "tender back" rule meaningless, permitting employees to retain the

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[2] Blakeney v. Lomas Information Systems, Inc., 65 F.3d 482 (5th Cir. 1995) cert. denied, 116 S.Ct. 1042 (1995); Wittorf v. Shell Oil Co., 37 F.3d 1151, 1154 (5th Cir. 1994); Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534, 539 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403 (1995); see 29 U.S.C. § 626(f)(1) (Older Workers Benefits Protection Act).

[3] Blakeney, 65 F.3d at 485; Wittorf, 37 F.3d at 1154; Wamsley, 11 F.3d at 539.

[4] See Oberg v. Allied Van Lines, Inc., 11 F.3d 679 (7th Cir. 1993), cert. denied, 114 S.Ct. 2104 (1994); Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir.), cert. denied, 113 S.Ct. 412 (1992).

[5] Lefarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389, 403 (5th Cir. 1995).

benefits of their bargain while at the same time not upholding their end of the bargain -- waiving their right to sue.

Finally, Hines disputes the district court's finding that he "did not even attempt to rescind [the waiver agreement] until nearly two years after he signed the contract, at which point [Hines's] opportunity to avoid the waiver agreement had long since lapsed."[6/] Hines argues that a mere four months passed between the date he learned the waiver agreement was voidable when Vetco raised the defense and the date the district court granted Vetco's summary judgment.

To properly rescind the contract, Hines had to "restore the status quo ante," and the recision "had to occur shortly after the discovery of the alleged deficiency."[7/] On September 5, 1995, Hines filed a Motion for Continuance on Vetco's Motion for Summary Judgment requesting an additional two weeks to "finalize the transaction whereby he [was] raising the funds." The district court denied Hines's motion on the basis that, even if it granted the motion, Hines's attempt at recision was too late.[8/] Hines's efforts to rescind the contract did not occur "shortly after the discovery of the alleged deficiency."[9/] Hines's Motion for Continuance came almost two years after he was terminated, six months after he filed suit, and four months after Vetco notified him of their intention to rely upon the waiver agreement as a defense. The district court did not err in granting Vetco's

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[6/] Dist. Ct. Op. p. 5

[7/] Blakeney, 65 F.3d at 485.

[8/] Dist. Ct. Op. p. 6, n.1.

[9/] Blakeney, 65 F.3d at 485.

summary judgment.[10/]

AFFIRMED.

U.S. COURT OF APPEALS
FILED
APRIL 29, 1996
CHARLES R. FULBRUGE III
CLERK

[10/] Blakeney, 65 F.3d at 482 n.3 (a tender which came "twenty-two months after termination, eight months after filing suit, and seven months after [the company's] motion for summary judgment alerted them to the waiver defense" was too late).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CHARLES HINES	§	
	§	
VS.	§	CIVIL ACTION NO. G-95-215
	§	
ABB VETCO GRAY	§	
INC.	§	

ORDER

Plaintiff, Charles Hines, commenced the instant action on April 18, 1995, alleging age discrimination action in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C.A. § § 621-34 (West 1985 & Supp 1995), and the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab. Code Ann. § § 21.001-.306 (Vernon 1995). Defendant, ABB Vetco Gray, Inc., filed a timely answer and counterclaim for breach of a waiver agreement prohibiting Plaintiff from commencing the instant suit. Now before the Court is Defendant's Motion for Summary Judgment on Plaintiff's claims and Defendant's counterclaim and for Rule 11 sanctions. Also before the Court is Plaintiff's Motion for a Continuance of consideration of Defendant's Motion. Defendant's Motion is **GRANTED** in part and **DENIED** in part. Plaintiff's Motion is **DENIED**.

I. STANDARD OF REVIEW

Summary judgment is appropriate is there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if there is a genuine issue for trial that must be decided by the trier of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 538 (1986). When deciding a motion for summary judgment, the Court must accept the evidence of the nonmoving

party and draw all justifiable inferences in that party's favor. Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513.

Under Rule 56, the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); see also Fed. R. Civ. P. 56(c). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); Wise v. E.I. Dupont De Nemours & Co., 58 F.3d 193, 195 (5th Cir. 1995). Once the moving party meets its Rule 56 burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts....[T]he nonmoving party must come forward with `specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 586-87, 106 S.Ct. at 1356 (quoting Fed. R. Civ. P. 56(e)). Summary judgment should be granted only if the evidence indicates that a reasonable fact-finder could not find in favor of the nonmoving party. Anderson, 477 U.S. at 248, 106 S.Ct. At 2510; see also Matsushita, 475 U.S. at 587, 106 S.Ct. at 1355-56.

II. BACKGROUND

Defendant terminated Plaintiff's employment on September 30, 1993. On the day of his discharge, Plaintiff met with Sharon Clarkson, Director of Human Resources at ABB Vetco Gray Inc., to discuss the details of his departure. During this meeting, Ms. Clarkson presented Plaintiff with a written agreement which purported to grant him a severance package consisting of eight weeks of salary, continued

group health and life benefits for sixty days, and three months of individual out-placement counseling in exchange for a waiver of legal claims against Defendant and Plaintiff's promise to cooperate in an orderly transition. The waiver provided, in relevant part:

> As material inducement for ABB Vetco Gray Inc. To enter into this letter agreement,...you hereby release and forever discharge ABB Vetco Gray Inc....from any and all liability...arising out of or relating to your employment with ABB Vetco Gray Inc., including, but not limited to, ...any claim of rights under any federal, state or local laws prohibiting age or other forms of discrimination (including...the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., and the Texas Commission on Human Rights Act).

Ms. Clarkson, who signed the agreement on Defendant's behalf, advised Plaintiff that he must sign the agreement immediately or Defendant's offer to enter into the agreement would be withdrawn. Plaintiff affixed his signature at the bottom of the agreement following the words "I have read and understand the provisions of this letter agreement and I accept its terms."

Approximately five weeks later, Plaintiff filed complaints of age discrimination with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights. During the proceedings before the respective Commissions, he obtained the services of his present attorney. Plaintiff did not, however, attempt to avoid the waiver while the administrative proceedings were pending by returning the consideration he received under the waiver agreement. Rather, he chose to wait nearly two years after signing the waiver agreement before

even expressing an intention to return the monetary part of his severance package to Defendant, and, as indicated by the record now before the Court, Plaintiff still has not actually made any funds actually available.

III. ANALYSIS

A. Plaintiff's Age Discrimination Claims

Defendant does not dispute Plaintiff's ability to establish a prima facie case of age discrimination under the ADEA or the TCHRA. Instead, Defendant argues that the waiver agreement of September 30, 1995, bars Plaintiff from litigating his claims. Specifically, Defendant contends that, although the waiver agreement admittedly violates the Older Workers Benefits Protection Act of 1990 ("OWBPA"), 29 U.S.C. § 626(f)(1) (West Supp. 1995), Plaintiff is now bound to the terms of the agreement because he ratified it by failing to return the consideration he received.

Waiver agreements failing to meet the requirements of the OWBPA are voidable at the election of the terminated individual. Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534, 539 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995); see also OWBPA, 29 U.S.C.A. § 626(f). But, as appalling as allegations of age discrimination are, and as much as the Court frowns on employers who obtain waivers in violation of the OWBPA, an employer is entitled to rely on the validity of such waivers in the absence of timely conduct taken by the terminated employee to avoid the contract. "A party cannot be permitted to retain the benefits received under a contract and at the same time escape the obligations imposed by the contract." Grillet v. Sears, Roebuck & Co., 927 F.2d 217, 220 (5th Cir. 1991). To the contrary, a party is deemed to have ratified a waiver agreement if he has retained all of the contractual benefits he received under the agreement for an

"unreasonably long period of time." Id. at 220-21; see also Wamsley, 11 F.3d at 540 (explaining the failure to return benefits paid under a voidable waiver contract manifests an intention to be bound by the waiver). To avoid ratification of the contract, the party must "attempt to restore the status quo ante...soon after" discovering that the waiver agreement is voidable. Grillet, 927 F.2d at 220-21 (emphasis added).

In the instant case, Plaintiff's attempt to avoid the waiver agreement is unsuccessful for two reasons. First, it was untimely. Plaintiff did not even attempt to rescind until nearly two years after he signed the contract, at which point Plaintiff's opportunity to avoid the waiver agreement had long since lapsed. Second, Plaintiff's attempt to avoid the waiver agreement was inadequate. Plaintiff never actually attempted to return the monetary consideration he received to Defendant, and by his own admission is still presently unable to do so.[1/] Plaintiff's offer to tender funds to Defendant at some point in the future on the mere expectation that he will indeed "finalize [a] transaction whereby he is raising the funds" does not constitute a satisfactory attempt to restore the status quo ante. See Williams v. Phillips Petroleum Co., 23 F.3d 930, 937 (5th Cir.,), cert. denied, 115 S. Ct. 582, 130 L.Ed.2d 497 (1994). Having found Plaintiff's offer to be both untimely and inadequate, the Court must regretfully conclude that Plaintiff has ratified the waiver agreement he signed on September 30, 1993, and accordingly is barred from maintaining his age

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[1/] The Court notes that even if Plaintiff were given an additional two weeks to raise funds as requested in his Motion for Continuance of Consideration of Defendant's Motion for Summary Judgment, Plaintiff's untimeliness would still prove fatal to his attempt to avoid the waiver agreement. See Grillet, 927 F.2d at 220-21.

discrimination claims. consequently, Defendant's Motion for Summary Judgment is GRANTED insofar as it seeks to dismiss Plaintiff's age discrimination claims.

B. Defendant's Counterclaim for Breach of Contract

Plaintiff's liability for breaching the waiver agreement turns on the intent manifested by the parties. Lubrizol Corp. v. Exxon Corp., 957 F.2d 1302, 1305 (5th Cir.) (quoting Artvale, Inc. v. Rugby Fabrics Corp., 363 F.2d 1002, 1008 (2d Cir. 1966)), cert. Denied, 113 S. Ct. 186, 121 L. Ed. 2d 131 (1992). In the absence of evidence to the contrary, contractual covenants not to sue are construed as imposing liability only for suits brought in bad faith. Lubrizol, 957 F.2d at 1306 (quoting Artvale, 363 F.2d at 1008). But see Widener v. Arco Oil & Gas Co., 717 F. Supp. 1211, 1217 (N.D. Tex 1989) (imposing liability without considering whether plaintiffs acted in bad faith). As Judge Friendly stated in Artvale,

> Certainly it is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages, including the most certain of all -- defendant's litigation expense. Yet to distill all this out of the usual formal covenant would be going too far; its primary function is to serve as a shield rather than as a sword . . . .

Artvale, 363 F.2d at 1008; see also Lubrizol, 957 F.2d at 1306.

In the instant case, the record lacks evidence of Plaintiff's bad faith in instituting claims of age discrimination. To the contrary, Defendant concedes Plaintiff's

ability to establish a prima facie case for purposes of the current motion, and Plaintiff vigorously contests the validity of the waiver agreement. The Court accordingly finds that Defendant is not entitled to damages for Plaintiff's breach of the waiver agreement. As is appropriate under the present circumstances, the Court GRANTS summary judgment for Plaintiff sua sponte on Defendant's counterclaim. See In re Caravan Refrigerated Cargo, Inc. 864 F.2d 388, 393 (5th Cir. 1989) ("[W]hen `one party moves for summary judgment the district court, in an appropriate case, may grant summary judgment against the movant, even though the opposite party has not actually filed a motion for summary judgment.'" (quoting Landry v. G.B.A. 762 F.2d 462, 464, (5th Cir. 1985) (citing C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d § 2720 at 33)), cert. denied, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 763 (1990).

C. Defendant's Motion for Rule 11 Sanctions

Defendant's basis for requesting sanctions pursuant to Rule 11 is the allegedly "clearly groundless" nature of Plaintiff's suit. Rule 11 provides, in relevant part[2/]: "claims, defenses, and other legal contentions therein

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[2/] The Court specifically calls to Defendant's attention the current, proper procedure for moving for Rule 11 sanctions, which incorporates the "safe harbor" provision:

> A motion for sanctions under this rule shall be made separately from other motions or requests and . . . shall not be filed with or presented to the court unless, within 21 days or after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdraw or properly corrected."

Fed. R. Civ. P. 11(c)(1)(A) (emphasis added).

[shall be] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. R. 11(b)(2). The Court finds that Plaintiff has not run afoul of this standard. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 540-51, 111 S. Ct. 922, 928-33, 112 L.Ed.2d 1140, 1152-59 (1991). Consequently, Defendant's Motion for Rule 11 Sanctions is **DENIED.**

IV. CONCLUSION

For the reasons stated above, the Court finds that Defendant's Motion for Summary Judgment is **GRANTED** insofar as it seeks to dismiss both of Plaintiff's claims and is **DENIED** insofar as it seeks relief pursuant to its counterclaim for breach of contract. Plaintiff's claims and Defendant's counterclaim are hereby **DISMISSED WITH PREJUDICE.** Defendant's Motion for Rule 11 Sanctions and Plaintiff's Motion for a Continuance on Defendant's Motion are both **DENIED.** Each party is to bear his or its own taxable costs and expenses incurred herein to date.

IT IS SO ORDERED.

DONE this 14th day of September, 1995, in Galveston, Texas.

/s/ SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
SEPTEMBER 15, 1995
Michael N. Milby, Clerk of Court

C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CHARLES HINES	§	
	§	
VS.	§	CIVIL ACTION NO. G-95-215
	§	
ABB VETCO GRAY	§	
INC.	§	

FINAL JUDGMENT

For the reasons set forth in the Order issued by the Court this date, the Court **GRANTS** Defendant's Motion for Summary Judgment insofar as it seeks to dismiss Plaintiff's claims and **DENIES** Defendant's Motion for Summary Judgment insofar as it seeks relief pursuant to its counterclaim for breach of contract. Consequently, the Court **DISMISSES** each and all of Plaintiff's claims **WITH PREJUDICE** and **DISMISSES** Defendant's counterclaim **WITH PREJUDICE.**

The Court **DENIES** Defendant's Motion for Rule 11 Sanctions and **DENIES** Plaintiff's Motion for a Continuance on Defendant's Motion.

All parties are **ORDERED** to bear their own taxable costs and expenses incurred herein to date.

THIS IS A FINAL JUDGMENT.

IT IS SO ORDERED.

DONE this 14th day of September, 1995, at Galveston, Texas.

/s/SAMUEL B. KENT
UNITED STATES DISTRICT
JUDGE

United States District Court
Southern District of Texas
ENTERED
SEPTEMBER 15, 1995
Michael N. Milby, Clerk of Court

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CHARLES HINES,	
Plaintiff,	
V.	**CIVIL ACTION NUMBER G-95-215**
ABB VETCO GRAY, INC.,	**JURY**
Defendant.	

AFFIDAVIT OF CHARLES HINES

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Charles Hines, who, being known to me and duly sworn, upon oath deposed and stated as follows:

1. My name is Charles Hines. I am of sound mind, am capable of making this affidavit, and am fully competent to testify to the matters stated in this affidavit. I have personal knowledge over each of the matters stated in this affidavit, and each of the matters stated in this affidavit is true and correct.

2. On September 30, 1993, I was and had been an employee of ABB Vetco Gray, Inc. ("ABB Vetco") for 5 years, and for the last 3 years I had

been "General Foreman of Valve and Wellhead Control for Service Products."

3. For the 5 years at ABB Vetco, I had received annual reviews rating me as "excellent," and after each year I received a 5% raise. As of September 30, 1993, profitability for my department was at a 5-year high, manufacturing methods had been made more efficient (less expensive), and deliveries were being made on time. These were important criteria for evaluating the success of my department, and none of these factors or statistics gave me any indication that my job was in jeopardy. I had not been approached about leaving the company before September 30, 1993, and I had made no efforts to leave the company.

4. In the morning of September 30, 1993, Bob McNamara, my boss at ABB Vetco, came into my office and told me that I was being laid off. I was in shock at that news, because Mr. McNamara had only recently reviewed me and gave me an "excellent" rating (with a 5% raise).

5. Mr. McNamara walked me into the office of Sharon Clarkson, who I understand was head of human resources at ABB Vetco. When Mr. McNamara and I walked into Ms. Clarkson's office, she had documents prepared, I soon learned, that assumed I was being fired. She had prepared on her desk a package of materials relating to benefits and a letter which I eventually signed while in her office. A copy of that letter is attached as Attachment 1 to this affidavit. Attachment 1 is the same document as is attached to Defendant's Motion for Summary Judgment. Attachment 1 was therefore already prepared, and already contained Sharon

Clarkson's signature, when Mr. McNamara and I walked into her office.

6. When I was in Ms. Clarkson's office with Mr. McNamara, I expressed my shock about being fired, and I discussed the fact that profitability and efficiency were "up", and neither Mr. McNamara nor Ms. Clarkson responded except to say there was nothing they could do, and Ms. Clarkson then explained the severance package that ABB Vetco could offer, "today," "right now" and that it would be withdrawn if I did not accept it. They had already made it clear to me that I was being fired effective immediately, so If I did not accept the severance package, I would be forced to leave immediately and would not even receive notice or pay in lieu of notice; but if I accepted the severance package, I would be paid for about 8 weeks (6 weeks for "severance" pay, and 2 weeks for pay in lieu of notice).

7. Ms. Clarkson pointed to the first page of Attachment 1 and explained what the company was offering me "right now", and she then turned over to the second page (containing what I now understand is a release of employment discrimination claims), and she pointed to the signature line and stated that they would need my signature "right here" in order for me to get my severance check. Neither she nor Mr. McNamara at that time explained that I was being asked to release claims against ABB Vetco, and no employee or representative of ABB Vetco ever told me that.

8. I signed Attachment 1 and was given my severance check the next day. I picked up the severance check from Ms. Clarkson's office, and she did not then or ever tell me that I had

released the company from employment discrimination claims.

9. As of the time I signed Attachment 1 to this affidavit, I had not asserted any claim in any form of employment discrimination (including age discrimination) against ABB Vetco. Attachment 1, to the extent that it contains a release, was not in response to any charge, claim, or allegation that I have made. Indeed, I thought my status with the company was secure, and had not received any criticism which might have suggested to me that I was going to be fired.

10. I was not advised by ABB Vetco in connection with the release to consult with an attorney, I was not given 21 days to consider the proposed release agreement, and I was not advised that I could revoke the agreement within 7 days after signing it. No one employed by or representing ABB Vetco told me any of these things, and I was not informed of any of things in writing by anyone employed by or representing ABB Vetco.

11. When I signed Attachment 1, I did not understand that it was a "release" of employment discrimination claims. Instead, as I could determine from quickly reading it when Ms. Clarkson presented me with the "today only" severance package, I thought Attachment 1 addresses what obligations the company might have concerning pay and benefits, and I thought Attachment 1 was indicating that the company would owe me no more money for salary, vacation pay, benefits, and the like.

12. The first time I understood that anyone contended that I "released" or "waived" any

employment discrimination claims was when ABB Vetco filed its answer and counter-claim against me after my lawyers filed suit on my behalf, and I then learned of ABB Vetco's claim concerning a release in late June of 1995. While my charge was pending at the Equal Employment Opportunity Commission ("EEOC"), no one with the EEOC informed me that ABB Vetco contended that I could not assert a claim because of a "release" or other document.

13. The first time I understood that I had any right under the law to attack the "release" which ABB Vetco contends bars my employment discrimination claims was in late June of 1995 when I received a copy of ABB Vetco's answer and counterclaim from my attorney. No one had ever before told me or communicated to me that I had any right to "void" or "rescind" or dispute the validity of the release upon which ABB Vetco is relying. Since learning in late June of 1995 that I might have a right to dispute the validity of the "release," I have tried but have been unable to raise the money to repay ABB Vetco for the "severance" money that I was paid the day after I was presented with Attachment 1. However, I have not been able to afford to pay the severance money back, and I have thus far not succeeded in borrowing the necessary money. I am currently in the process of trying to raise the money, and it is likely that I will have an answer on September 5, 1995, as to whether I will be able to borrow the necessary money.

14. When I was confronted with the decision of signing Attachment 1 in Ms. Clarkson's office, I knew that losing my job, and receiving no severance pay, would be a financial disaster for me and my wife. My wife was then making

about $600-800 per month doing part-time secretarial work, and she was under continuing care for breast cancer, for which she had surgery and follow-up surgery caused by complications. My household's fixed expenses were approximately $2,800 per month, so losing my job raised the prospect of bankruptcy, losing my home, and losing my health insurance benefits for my wife's follow-up treatment for breast cancer.

15. I was replaced at ABB Vetco by Mr. Young, who I understand was under 40 years of age.

16. As to the money that I received as my "severance package" when I was fired (approximately $8,500). My wife and I used that money for various household and living expenses after being fired from ABB Vetco. After losing my job with ABB Vetco, I was completely unemployed for various periods of time, and used the severance money for living expenses. Because of that, when I learned this year about ABB Vetco claiming that I had released the claims I am asserting in this lawsuit, I did not have over $8,000 to return the money to ABB Vetco. I am in the process of trying to raise the necessary money to repay ABB Vetco.

/s/ CHARLES HINES
Charles Hines

SWORN TO AND SUBSCRIBED BEFORE ME this 2nd day of September, 1995, to certify which witness my hand and seal of office.

/s/ DIANE LEFFINGWELL
Notary Public in and for
The State of T E X A S

/s/DIANNE LEFFINGWELL
(Printed or Typed Name of Notary)

05/02/96
(Commission Expiration Date)

ABB Vetco Gray, Inc.

September 30, 1993

Mr. Charles A. Hines
15210 Ringfield
Houston, Texas 77084

Dear Chuck:

This letter is to reflect our agreement concerning your departure from ABB Vetco Gray Inc. Your last day of employment shall be September 30, 1993.

We have agreed that you will receive a lump sum gross payment based on your current salary of $4,631.00 per month, which represents the following:

6	*weeks severance pay*
2	*weeks pay in lieu of notice*
___	*hours of remaining 1993 vacation*
___	*hours of accrued vacation for 1994*

You will receive three months individual out-placement counseling. Your group health and life benefits will continue for sixty (60) days following the date of your termination. Following that period, you will be entitled to benefits as mandated by COBRA.

In recognition and consideration of the foregoing, you have agreed to cooperate in an orderly transition. You agree to maintain in confidence and not disclose to others any

confidential or proprietary information relating to the business, customers, personnel, and products of ABB Vetco Gray Inc.

As a material inducement for ABB Vetco Gray Inc. to enter into this letter agreement, and except for specific obligations of ABB Vetco Gray Inc. contained in this letter agreement, you hereby release and forever discharge ABB Vetco Gray Inc. and all of its employees, officers, and directors, from any and all liability and every claim, demand, or cause of action, past, present, and future, of every kind and character whatsoever, in any manner, arising out of or relating to your employment with ABB Vetco Gray Inc., including, but not limited to, any claim arising out of contract or tort, and any claim of rights under any federal, state, or local laws prohibiting age or other forms of discrimination (including Title VII of the Civil Rights Act of 1964, 42 USC §2000e, et seq., the Age Discrimination in Employment Act, 29 USC §621, et seq., and the Texas Commission on Human Rights Act), whether such claim is now known or unknown.

If the terms and conditions of this letter agreement are acceptable to you, please acknowledge your agreement by executing this letter in the space provided below.

ABB VETCO GRAY INC.

/s/SHARON L. CLARKSON
Sharon L. Clarkson
Director of Human Resources

I have read and understand the provisions of this letter agreement and I accept its terms.

09-30-93
Date

/s/ CHARLES A. HINES
Charles A. Hines

FILED
DEC 4 1996
CLERK

No. 96-546

In The

Supreme Court of the United States

October Term, 1996

CHARLES HINES,

Petitioner,

vs.

ABB VETCO GRAY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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30 pp

QUESTION PRESENTED

Whether a plaintiff may challenge a release of an Age Discrimination in Employment Act claim while retaining the consideration paid to him for the release of such claim, where that release failed to comply with the Older Workers Benefit Protection Act, or whether such retention constitutes effective common law ratification.

PARTIES TO THE PROCEEDING

Petitioner, appellant below, is Charles Hines. Respondent, appellee below, is ABB Vetco Gray, Inc. Pursuant to Supreme Court Rule 29.1, Respondent discloses that the parent companies of Respondent ABB Vetco Gray are ABB Oil and Gas USA Inc., a Delaware corporation, Asea Brown Boveri AS, a Norwegian company, and ABB Asea Brown Boveri Ltd., a Swiss company. ABB Vetco Gray's subsidiaries (other than wholly owned subsidiaries) are ABB Holdings Limited (England), ABB Vetco Gray Kazakhstan, PT Vetco Gray Indonesia, and PT Aisabayu Berkak (Indonesia).

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The Respondent, ABB Vetco Gray, Inc. ("ABB Vetco Gray"), respectfully files this Brief in Opposition and requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case entered on April 29, 1996.

STATEMENT OF THE CASE

ABB Vetco Gray adopts by reference the statement of facts or "Background" in the District Court's Order dated September 14, 1995, granting summary judgment in favor of ABB Vetco Gray. (Petitioner's Appendix ("Pet. App.") B-3, B-4). Respondent challenges paragraphs 8, 10, 11, 12 and 13 of Petitioner's Statement of Facts as argumentative, irrelevant, and not established by the evidence in the courts below.

REASONS FOR DENYING THE WRIT

The Petitioner commenced this action on April 18, 1995, alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. §§ 621-634. Respondent filed a timely answer and counterclaim for breach of a waiver agreement; Petitioner had signed a release waiving any age discrimination claims in exchange for extra severance benefits to which the Petitioner was not otherwise entitled. In response to Respondent's counterclaim, the Petitioner alleged that the waiver was unenforceable because it failed to comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA"). 29 U.S.C. § 626(f). The District Court granted summary judgment in favor of the Respondent, finding that the Petitioner had ratified the allegedly unenforceable waiver by failing to timely tender back the severance consideration. (Pet. App. B). Pursuant to its well established precedent, the Fifth Circuit affirmed. (Pet. App. A).

The decisions of the courts below were correct, and the

Petition for Writ of Certiorari should be denied, because: (1) the tender back rule is consistent with the language of the OWBPA; (2) the tender back rule, as applied to ADEA waivers, is not invalidated by this Court's decision in *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968); (3) the tender back rule is correct as a matter of policy; and (4) there is no active conflict among the courts of appeal with regard to the tender back requirement.

I.

THE FIFTH CIRCUIT'S TENDER BACK RULE IS CONSISTENT WITH THE LANGUAGE OF THE OLDER WORKERS BENEFIT PROTECTION ACT.

Effective October 16, 1990, the ADEA was amended by the OWBPA. In enacting the OWBPA, Congress resolved a split among the circuits by codifying the "totality of the circumstances" test for determining the validity of a waiver of ADEA claims.[1] The legislative history of the OWBPA indicates that the fundamental purpose of the OWBPA's waiver provisions was to ensure that waivers were obtained without fraud, duress, coercion, or mistake of material facts.[2]

Petitioner contends that the plain language of the OWBPA

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1. *See* S. Rep. No. 263, 101st Cong., 2d Sess. 32, *reprinted in* 1990 U.S.CODE CONG. & ADMIN.NEWS 1509, 1537 ("The Committee expects that courts reviewing the "knowing and voluntary" issue will scrutinize carefully the complete circumstances in which the waiver was executed. The Committee expreses (sic) support for the [totality of the circumstances] approach taken on this limited issue in *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3rd Cir. 1988), and disapproves the [ordinary contract principles] approach adopted in *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987), *cert. denied*, [482 U.S. 928, 107 S. Ct. 3212, 96 L.Ed.2d 699] (1987).").

2. *Id.*

precludes ratification of a release otherwise in violation of the OWBPA. The language upon which the Petitioner relies states that an individual "may not" waive any ADEA claim unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). In effect, Petitioner argues that the OWBPA abrogates the application of common law contract principles to the enforceability of ADEA waivers, other than those expressly codified by the OWBPA. As discussed below, Petitioner's arguments are without merit.

By its terms, the OWBPA merely codifies, in the context of claims under the ADEA, a centuries-old principle that a "waiver" must be "knowing and voluntary." *Id.* In contending that the OWBPA abrogates the equally venerable common law principle of ratification, the Petitioner not only ignores the statute's plain language, but entirely ignores the common law background against which the OWBPA was enacted. Moreover, the Petitioner disregards the well-established principles applicable to claims of statutory abrogation of the common law.

It is undisputed that the Petitioner's claim would be barred by the common law ratification doctrine. At common law, releases tainted by fraud, mistake or duress are merely voidable, not void, at the option of the defrauded, mistaken or coerced party. *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 538 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 (9th Cir. 1988) (Guam law); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1368 (6th Cir. 1975) (federal common law under the ADEA). However, the common law also makes clear that such a voidable release can be ratified: "the releasor who retains consideration after learning that the agreement is voidable has effectively ratified the release and may not later avoid its terms." *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank*, 936 F.2d 846, 850 (6th Cir. 1991), *cert. denied*, 502 U.S.

1034 (1992).[3] Ratification does not amount to enforcement of the release as a contractual obligation; put simply, the plaintiff's subsequent conduct in retaining the consideration paid to obtain the release makes prosecution of the claims fundamentally unfair. *Wamsley*, 11 F.3d at 540 n. 11; *Blistein v. St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996); *see also Cumberland*, 936 F.2d at 850; *In re Boston Shipyard Corp.*, 886 F.2d at 455; *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985).

Prior to the enactment of the OWBPA, courts routinely applied ratification principles to ADEA releases. *See, e.g., O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). As recognized by the Fifth Circuit, nothing in the OWBPA abrogates the common law principle that an invalid waiver can be ratified by subsequent conduct. *See Wamsley*, 11 F.3d at 539.[4]

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3. *See also Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995) (federal common law); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (federal common law); *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178, 182 (5th Cir. 1985) (Texas law); *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-34 (2d Cir. 1982) (New York law), *cert. denied*, 461 U.S. 915 (1983).

4. Petitioner's almost exclusive reliance on the language of the OWBPA for the contention that the principles of ratification are inapplicable is curious. The court in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992), a case relied upon by the Petitioner, did not consider the language of the OWBPA and in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), also relied upon by Petitioner, the Seventh Circuit specifically relied on the *Forbus* decision in its analysis. In addition, the Seventh Circuit's observation in *Oberg* that the "language of the OWBPA . . . forbids any waiver" is suspect. *Id.* at 683. Clearly, the OWBPA does not forbid "any waiver" since the purpose of the OWBPA was to set standards for ADEA waivers. Instead, the OWBPA makes clear that any waiver must be "knowing and voluntary."

As observed by the Fourth Circuit in *Blistein*, Congress' reliance upon the common law terms "knowing" and "voluntary" suggests that Congress "was defining only those circumstances in which a contract would be voidable, not when it would be void." *Blistein*, 74 F.3d at 1466. "Indeed, if anything, the text of OWBPA lends support to that holding through its implicit recognition that an ADEA release agreement that does not meet the OWBPA's requirements is merely a voidable, not a void, contract." *Id.* In *Wamsley*, the Fifth Circuit observed that at common law, fraud, duress and mistake did not void a contract, but, rather, only rendered that contract voidable." *Wamsley*, 11 F.3d at 538 (citing RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b).

The conclusion that a release which fails to satisfy the OWBPA's requirements is merely voidable is further bolstered by Congress' inclusion of § 626(f)(1)(G). Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. 29 U.S.C. § 626(f)(1)(G). "If noncompliance with the other subparts . . . rendered the agreement void there would be no need for subpart (G)." *Wamsley*, 11 F.3d at 539. Surely Congress would not give an employee the right to void a non-complying release, as provided in subpart (G), if such a release were void *ab initio*. The Petitioner has failed to present any evidence that Congress intended such an anomalous result.

In addition, the express language of the OWBPA fully empowered the court of appeals to bar the Petitioner's claims. It is undisputed that the OWBPA did nothing to erase the ADEA's broad grant of equitable power to the courts. 29 U.S.C. § 626(b). Equitable power implies not only the discretion to apply specific common law doctrines, such as ratification, *see, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982);

Occidental Life Ins. Co. of California v. EEOC, 432 U.S. 355, 373 (1977), but an even broader discretion to deny remedies which would be unjust and unfair. *See McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879 (1995). Thus, contrary to the Petitioner's claims, the specific language of the OWBPA supports the ruling below.

Further, the OWBPA does not exhaustively control the enforceability of ADEA waivers. Nothing in the OWBPA prohibits application of common law principles to ADEA waivers. In fact, employees continue to challenge the enforceability of ADEA waivers on common law, non-statutory grounds. *See Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368 (11th Cir. 1995) (ADEA release challenged under common law fraud doctrine and other non-statutory ground); *Rivers v. Northwest Airlines, Inc.*, 1995 WL 888612 (E.D. Mo.), *aff'd*, 72 F.3d 133 (8th Cir. 1995) (alleged involuntariness of release not the result of lack of compliance with the requirements of the OWBPA). For example, in *Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994), in which the Fifth Circuit required tender back, there was no dispute that the OWBPA requirements were satisfied. Thus, it is neither improper nor inconsistent to allow employers to assert common law defenses, such as ratification, when employees continue to enjoy a full panoply of common law challenges to ADEA waivers. Rather, precluding application of such defenses, while continuing to permit common-law challenges, as urged by the Petitioner, would create an inequitable inconsistency in this nation's labor policy.

Finally, the Petitioner's contention that the OWBPA abrogates the application of well-settled common law doctrines is in direct contravention of this Court's precedent that "[w]here a common-law principle is well established the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the

contrary is evident.' " *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). Indeed, this Court has repeatedly made clear that "[i]n order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higinbotham*, 436 U.S. 618, 625 (1978)). *See also Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36 (1983). These principles are equally applicable to federal antidiscrimination statutes. *Zipes*, 455 U.S. at 393-94 (Title VII limitations defenses subject to waiver, estoppel and equitable tolling); *Occidental Life Ins. Co.*, 432 U.S. at 373 (EEOC right of action subject to laches).

Nothing in the OWBPA "speaks directly" to the common law principle of ratification. Petitioner has failed to cite any piece of legislative history which would suggest that Congress intended to abrogate the application of common law ratification principles to ADEA waivers. Rather, as discussed above, the OWBPA's legislative history clarifies that Congress was simply codifying settled common law principles, under which any release must be, at a minimum, knowing and voluntary. The principle that a waiver is voidable if its execution was not "knowing and voluntary" has long co-existed with the separate and distinct principle that an otherwise invalid waiver is nevertheless subject to ratification by subsequent conduct. As Respondent has shown, the OWBPA does nothing to alter this longstanding harmonious relationship.

II.

THIS COURT'S DECISION IN *HOGUE V. SOUTHERN RY. CO.* DOES NOT INVALIDATE THE FIFTH CIRCUIT'S TENDER BACK REQUIREMENT.

Petitioner also asserts that this Court should grant certiorari because the Fifth Circuit's tender back rule, as relied upon by the lower courts in this case, is inconsistent with this Court's decision in *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968).

In *Hogue*, the petitioner suffered an injury while working in the respondent's shops. Subsequently, the petitioner executed a release in consideration for the respondent's payment of $105. After discovering that his injury was more serious than he previously thought, the petitioner sued the respondent under the Federal Employer Liability Act ("FELA"), 45 U.S.C. § 51-60, claiming that the release was executed as the result of a mutual mistake of fact.

The petitioner was unsuccessful in the lower courts. The Georgia Court of Appeals ruled that a plaintiff who attacks a previously executed release under the FELA, must, as a condition to bringing his suit, tender back to the employer the consideration he received for the release. The petitioner subsequently sought relief in this Court.

This Court reversed the Georgia Court of Appeals, holding that a tender back of consideration received by the petitioner for a release was not a prerequisite to him bringing suit under the FELA for his injury. *Id.* at 516-18. This Court reasoned as follows:

> [A] rule which required a refund as a prerequisite to institution of suit would be wholly incongruous with the general policy

> of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. Rather, it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee.

Id. at 518.

Petitioner claims that the Fifth Circuit's tender back rule, as relied upon by the lower courts, is inconsistent with *Hogue*. In addition, the authority upon which Petitioner relies to challenge the tender back rule is primarily based on *Hogue*. *See Oberg*, 11 F.3d 679 (7th Cir. 1993); *Forbus*, 958 F.2d 1036 (11th Cir. 1992); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991). Plaintiff, however, provides neither argument nor analysis establishing why this Court's interpretation of a tender back requirement under the FELA should be applicable to the ADEA. A closer examination of the *Hogue* decision, as well as the purposes of, and policies behind, the FELA and the ADEA, strongly suggests that *Hogue* is inapplicable to this case.

Initially, the procedural posture of *Hogue* makes it very weak support for Petitioner's contention that the no tender back rule should be extended from the FELA to the ADEA. In *Hogue*, after this Court granted certiorari, the respondent employer confessed error and declined to present either briefing or oral argument. 390 U.S. at 516. The Court issued a brief three page *per curiam* opinion, limited to claims under the FELA and releases challenged on the ground of mutual mistake, without the benefit of adversarial presentation. *See id.* at 517. Noticeably absent from Petitioner's brief is citation to any opinion of this Court in which it has foreclosed the application of the ratification

doctrine under circumstances remotely similar to those presented in this case.

Moreover, as the Fifth Circuit has recognized, *Hogue's* FELA-based holding cannot be fairly extended beyond the unique context of that particular statute. *See Wamsley*, 11 F.3d at 540-41. The FELA provides that railroads operating in interstate commerce:

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

The purpose of the FELA is to provide a broad remedial framework for railroad workers injured by the negligence of their employers and, in light of that purpose, is to be liberally construed in their favor. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62 (1987); *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) (FELA designed "to provide for liberal recovery"). The FELA's legislative history makes this purpose clear:

> [T]he employers' liability law . . . places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs

> of the men in this dangerous employment. . . . It was the intention of Congress in the enactment of this law . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can . . . "measurably control their causes."[5]

To promote the goal of liberal recovery, the FELA's statutory liability scheme strips an employer of its common law defenses and imposes liability if the employer's "negligence played any part, even the slightest, in producing the injury for which damages are sought." *Wamsley*, 11 F.3d at 541 (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-07 (1957)); *see also Buell*, 480 U.S. at 562 n. 8. A plaintiff's burden in a FELA action is therefore significantly lighter than it would be in an ordinary negligence action. *Lisek v. Norfolk and Western Ry. Co.*, 30 F.3d 823, 832 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995). Thus, in *Hogue*, this Court merely advanced the FELA's purpose of providing liberal recovery to workers for injuries sustained in their inherently dangerous occupations. *Wamsley*, 11 F.3d at 541.

On the other hand, Congress passed the ADEA to:

> [P]romote the employment of older persons based on their ability rather than their age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find a way of meeting problems arising from the impact of age on employment.

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5. *Wamsley*, 11 F.3d at 541 n. 12 (quoting Griffith, *The Vindication of a National Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Prob. 160 (1953) (quoting from 45 Cong. Rec. 4041 (1910))).

29 U.S.C. § 621(b). Noticeably absent from the language of the ADEA and its legislative history is any evidence that Congress enacted the ADEA to promote liberal, unburdened and expeditious recoveries to employees. *Wamsley*, 11 F.3d at 541-42. In fact, unlike the FELA, which requires no more proof than that the employer's negligence played *any* role in the employee's injury, an ADEA plaintiff cannot succeed unless he or she establishes intentional discrimination. *Biggins v. Hazen Paper, Co.*, 507 U.S. 604 (1993).[6] To establish intentional discrimination under the ADEA, the plaintiff must establish that the employer's action was based on the plaintiff's age and that the plaintiff's age was, in fact, the determinative factor in the employer's decision to take such action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 513 (1993); *Hazen Paper*, 507 U.S. at 610.

Further, the FELA expressly states that "[a]ny contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under this chapter, shall to that extent be *void*." 45 U.S.C. § 55 (emphasis added). The OWBPA, by contrast, does not render contractual waivers void, but merely requires them to be "knowing and voluntary" under specified standards. 29 U.S.C. § 626(f)(1).

Moreover, as recognized by the Fifth Circuit, there are

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6. Although this Court has not addressed the issue, most courts doubt that a disparate impact claim can be asserted under the ADEA. *See Hazen Paper*, 507 U.S. at 610 ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA."); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007-10 (10th Cir.), *cert. denied*, 116 S. Ct 2500 (1996); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir. 1995); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3rd Cir.), *cert. denied*, 116 S. Ct. 306 (1995); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995).

crucial differences between settling FELA claims and settling a potential claim under the ADEA. *See Wamsley*, 11 F.3d at 542.[7] In the case of a FELA claim, the employee has already suffered an injury and the only remaining issue is the amount of damages. *Id.* In contrast, when an employee is being terminated, there has not necessarily been an injury resulting from age discrimination; both the issues of liability and damages remain unresolved. As discussed above, an ADEA plaintiff must prove that the employer terminated him *because* of his age. *Hazen Paper*, 507 U.S. at 610. In offering a severance package in exchange for a release, the employer is merely seeking to "compromise in advance a potential age discrimination event and to offset in advance any loss and injury which an employee might experience if such an event were to occur." *Wamsley*, 11 F.3d at 542.

In a FELA case, offsetting severance compensation from total damages is more appropriate since there is little dispute that the employee has been injured. On the other hand, in an ADEA case, neither liability nor damages are presumed. Permitting the plaintiff to retain severance benefits paid in consideration for a release until after these issues have been fully litigated (no doubt several years and thousands of dollars later) is clearly inappropriate, as the very purpose of the release for the employer is to avoid such costly litigation.

Thus, application of *Hogue's* FELA-based holding to ADEA severance situations is, as found by the Fifth Circuit, incongruous. *Id.* at 541 n. 13.

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7. Although *Wamsley* addressed the differences in the context of a reduction in force, the same analysis applies to this case in which the employer terminated the employee.

III.

THE FIFTH CIRCUIT'S TENDER BACK RULE, AS FOLLOWED BY THE COURTS BELOW, IS CORRECT AS A MATTER OF POLICY.

The issue in this case is very simple: whether an employee who receives severance compensation in exchange for a release of, *inter alia*, an age discrimination claim, may retain such compensation while challenging the release by suing the employer for age discrimination.[8] The answer must be no. A contrary answer would permit the employee to finance litigation against his or her employer with the same funds the employer paid the plaintiff as consideration for a release from such litigation. A plaintiff simply cannot have it both ways: i.e., retaining the benefits received pursuant to a severance agreement, yet challenging the very agreement under which those benefits were paid. *Blistein*, 74 F.3d at 1466.[9]

The courts which have not required a plaintiff to tender back the compensation received as a condition of suing the employer have expressed concern that such a rule would "chill" legitimate age discrimination lawsuits.[10] *See, e.g., Isaacs v. Caterpillar,*

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8. Under the OWBPA and the common law, compensation sufficient to support a release must consist of compensation to which the employee is not otherwise entitled. 29 U.S.C. § 626(f)(1)(D).

9. As the Fourth Circuit stated in *Blistein*: "[i]f we were to follow *Oberg* . . . we would allow persons like [the plaintiffs] to have it 'both ways,' to retain the benefits that they receive pursuant to their retirement agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended. This, we find no evidence Congress contemplated." 74 F.3d at 1466.

10. Such a concern concedes Respondent's position that allowing a (Cont'd)

Inc., 765 F. Supp. 1359 (C.D. Ill. 1991). Such a concern simply does not comport with reality. It is undisputed that the overwhelming majority of plaintiffs enter into contingent fee arrangements with their lawyers, whereby the costs of litigation are taken from the ultimate recovery. It cannot be seriously argued that the Fifth Circuit's tender back rule "chills" contingent fee agreements. Moreover, requiring a plaintiff to tender back severance/release consideration merely requires the plaintiff to return to the position in which he or she would have been absent the severance agreement: with the ability to file a lawsuit but without the compensation the employer paid to avoid such lawsuit. Such a *status quo ante* result places all parties on equal footing.

Rather than "chill" lawsuits by plaintiffs, a refusal to require a tender back in ADEA cases would more likely "chill" settlements or an employer's willingness to offer such added severance benefits. If confronted with a no tender back rule, employers would have reduced incentive to prospectively settle possible age cases or to provide employees with extra severance compensation in exchange for a release. Fearing a technical violation of the OWBPA, employers would be more inclined to retain severance benefits to finance the defense of the age cases that are actually filed.[11] This result would run contrary to the

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(Cont'd)

plaintiff to retain the severance compensation provides the financing for the plaintiff's lawsuit. Additionally, this position is legally irrelevant since the pertinent question is not the wisdom or fairness of the tender back rule and ratification, but whether the OWBPA has directly abrogated them. *See United States v. Texas*, 507 U.S. 529, 534 (1993).

11. In *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259, 260-61 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995), the Seventh Circuit endorsed the principle that the tender back rule makes releases more valuable to employers and encourages voluntary settlements, which benefits both employees and employers in the long run.

ADEA's express purpose of helping employers and workers find a way of meeting problems arising from the impact of age on employment. *See* 29 U.S.C. § 621(b).

IV.

THERE IS NO ACTIVE CONFLICT BETWEEN THE CIRCUITS.

In urging this Court to grant his Petition for Writ of Certiorari, the Petitioner contends that a conflict exists among the courts of appeal, citing *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993) and *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992). However, upon scrutiny, it is apparent that the alleged conflict is one of form rather than substance. As Justice Harlan explained, certiorari should be denied "where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 112 (1959). This is such a case. Recent jurisprudence from the Seventh Circuit signals a shift toward possible adoption of the tender back requirement. Further, the Eleventh Circuit has not readdressed the tender back issue since its 1992 pre-OWBPA *Forbus* decision, and consequently has failed to analyze many arguments supporting the tender back requirement. Finally, a trend is emerging in the nation's courts toward adoption of the tender back requirement.

The Petitioner correctly notes that in *Oberg*, the Seventh Circuit rejected any tender back requirement when confronted with a release of ADEA claims violative of the OWBPA. 11 F.3d at 684. However, the Petitioner fails to acknowledge that the Seventh Circuit subsequently questioned the reasoning of its *Oberg* decision and that of similar decisions, including *Forbus*. *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994).

In *Fleming*, the Seventh Circuit enforced a tender back requirement where the plaintiff challenged the validity of a release of her Title VII and Rehabilitation Act claims. Speaking through Chief Judge Posner, a unanimous panel (Eshbach and Easterbrook, JJ.) cited the Fifth Circuit's *Wamsley* decision — with approval — for the proposition that "a release can be rescinded only upon a tender of any consideration received." 27 F.3d at 260-61. The Seventh Circuit held that, because the tender back rule is a widely accepted "general principle of contract law," it "would surely be a component of any federal common law of releases." *Id.* The Seventh Circuit explained in detail how this rule, by making releases more valuable to employers, and thus encouraging voluntary settlements, helps both employers and employees in the long run. "The tender requirement is not a remedy. It is a protection for defendants, although it may as we have noted benefit plaintiffs in the long run too; a premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract." *Id.* at 262.

Addressing age discrimination cases specifically, the Seventh Circuit noted that the common law rule "*may* have to give way," but noted that the Fifth Circuit in *Wamsley* had "strongly criticized our decision in *Oberg*." *Id.* at 261. (emphasis added). Tellingly, the Seventh Circuit referred to *Oberg* and its progeny as follows: "[t]he idea behind these cases . . . is a little obscure to us." *Id.* (citations omitted). Thus, it appears that this Court's intervention is not necessary to correct any perceived conflict between the Fourth, Fifth and Seventh Circuits as the emerging jurisprudence from the latter circuit appears to signal a shift toward adoption of the tender back requirement in employment cases generally.

The Petitioner also cites the Eleventh Circuit's *Forbus* decision as evidence of a conflict. Initially, it should be

highlighted that *Forbus* was a pre-OWBPA decision. In *Forbus*, the Eleventh Circuit relied almost entirely on this Court's holding in *Hogue* to reject a tender back requirement stating that neither the Fifth Circuit nor the Fourth Circuit had considered the *Hogue* decision in their analyses. *Forbus*, 958 F.2d at 1040-41.[12] Following the *Forbus* decision, the Fifth Circuit addressed the alleged impact of *Hogue* and the OWBPA and continues to refuse to enforce a similar rule under the ADEA. *See Wamsley*, 11 F.3d at 540-542. Importantly, the Eleventh Circuit has not revisited the tender back requirement since *Forbus*, and as a result, has not addressed the Fifth Circuit's thoughtful analysis of *Hogue* and the OWBPA. Thus, this Court's intervention at this time would arguably be premature.

Additionally, a trend is emerging in this nation's courts toward adoption of the tender back requirement. *See Blistein*, 11 F.3d 1459; *Hodge v. New York College of Podiatric Medicine*, 1996 WL 527330 (S.D.N.Y. 1996) (following the rationale and rule of *Wamsley*); *Long v. Sears, Roebuck & Co.*, 1996 WL 94537, 7 (E.D. Pa. 1996) ("We believe that *Wamsley* is consistent with this jurisdiction's pre-OWBPA jurisprudence and would be followed if presented to the Third Circuit"); *Rivers*, 1995 WL 888612 (E.D. Mo. 1995) (adopting the reasoning of the Fifth Circuit in *Wamsley*, and noting the Seventh Circuit's questioning of its own decision in *Oberg*).[13] *See also Deren v. Digital Equip. Corp.*, 61 F.3d 1 (1st Cir. 1995) (enforcing tender back requirement where plaintiff sought to avoid release of alleged ERISA claims); *Fleming*, 27 F.3d 259. This trend itself is a sufficient ground upon which to deny certiorari.

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12. *Forbus* addressed the Fifth Circuit's decision in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) and the Fourth Circuit's decision in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991), both pre-OWBPA cases.

13. *But see EEOC v. Sara Lee Corp.*, 923 F. Supp. 994 (W.D. Mich.

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Finally, this Court has repeatedly indicated in recent years that the precise judicial disagreement alleged by Petitioner does not presently warrant further review. The petitioners in *Oberg* and *Wamsley* each sought a writ of certiorari from this Court to address the questions and arguments asserted in the Petition *sub judice*. Nonetheless, this Court declined to review the issue each time. *See Oberg*, 114 S. Ct. 2104 (1994); *Wamsley*, 115 S. Ct. 1403 (1995).

As discussed above, the alleged conflict is one of form rather than substance. Considering the Seventh Circuit's apparent shift toward the tender back rule, the Eleventh Circuit is left as the sole court of appeal in apparent conflict with the Fifth Circuit. If presented with another opportunity to address this issue, and considering the language and legislative history of the OWBPA, the Fifth Circuit's *Wamsley* decision, and the Fourth Circuit's *Blistein* decision, it is possible that the Eleventh Circuit would similarly reverse field in the wake of the emerging trend toward adoption of the tender back requirement in employment cases. Until that time, this Court's intervention would likely be premature and arguably unnecessary.

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1995) (following *Oberg* and providing for deduction of severance benefits from any damages award); *Soliman v. Digital Equipment Corp.*, 869 F. Supp. 65 (D. Mass. 1994) (same).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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